ODIN HASBI & ORS

v.

PP

HIGH COURT SABAH & SARAWAK, KUCHING
MUHAMAD KAMIL AWANG J
[CRIMINAL APPEAL NO: 42-17-98/II]
28 JUNE 2000

EVIDENCE: *Statement - Accused's statement to the police - Whether admissible - Whether made as a result of threat*

EVIDENCE: *Accomplice - Credibility - Whether evidence of accomplice should have been accepted - Whether accomplice had vested interest in the case*

CRIMINAL PROCEDURE: *Report or certificate - Medical report - Whether served on the accused persons - Whether trial judge precluded from considering oral evidence of doctor - Criminal Procedure Code, s. 399(i)*

The three accused persons were jointly charged for the offence of rape punishable under s. 376 of the Penal Code read together with s. 34 of the same Code. At the conclusion of the trial, the three accused persons were convicted and sentenced to an imprisonment term of 13 years and to be whipped with ten strokes of the rotan. Hence this appeal.

The grounds of appeal are that: (a) the trial judge erred in admitting the cautioned statement of the first appellant in that the making of the cautioned statement was caused by threat and also that the first appellant was interrogated for a continuous period of six hours and that he was also assaulted; (b) the trial judge had misdirected herself in convicting the first appellant by relying on the evidence of PW1 considering that PW1 was originally charged together with the three appellants and that prior to the trial, PW1 was discharged not amounting to an acquittal, thus enabling him to become a prosecution witness; and (c) the three appellants were not served a copy each of the medical report, contrary to s. 399(i) of the Criminal Procedure Code ('the CPC').

Held:

[1] Since proof of inducement or threat is difficult and in many cases impossible to attain at that stage, the discretion of the court is unfettered by the concrete standard of proof necessary in other cases.

The court is therefore free to scrutinise the evidence and surrounding circumstances to determine the presence or absence of any threat or inducement, its sufficiency and how it worked in the mind of the accused.

[1a] The cautioned statement was recorded on 24 March 1994 at 1.20pm and the first appellant was taken out practically everyday for interrogation after his arrest on 20 March 1994. Having taken the allegations and the whole circumstances of this case into consideration, the prosecution had failed to establish beyond a reasonable doubt that the cautioned statement of the first appellant was given voluntarily.

[2] The fact that the charge against PW1 was withdrawn with the plea that he should not be acquitted gives rise to the inference that he was influenced by a continuing inducement to give favourable evidence for the prosecution. The inducement was too strong (as it was coupled with a threat that proceedings would be continued against him any time by the prosecution) to allow the court to admit the evidence of PW1. The evidence of PW1 therefore ought to have been excluded.

[2a] With the exclusion of the evidence of PW1 and the cautioned statement by the first appellant, and without positive identification evidence of the second and third appellant by the complainant, the charge against both the second and third appellants could not stand.

[3] All the three appellants together with PW1 signed individually and acknowledged that they had received a copy of the medical report. There was no evidence to suggest that only one medical report was served and shared among the four named recipients therein. Section 399(i) of the CPC therefore had been complied with.

[3a] Even if there was a contravention of s. 399 of the CPC, the trial judge was not precluded from considering the oral evidence of the doctor who examined the complainant after the alleged offence of rape was committed.

[4] The evidence of the complainant had been amply corroborated in all material particulars by the evidence of the medical officer, the aunt of the complainant, and a friend who was with the complainant on the day of the incident and also on the day when the first appellant was arrested. There was therefore no misdirection on the principles adopted by the trial judge.

[First appellant's appeal dismissed; second and third appellants' appeal allowed.]

Case(s) referred to:
Liew Chin Yoong v. PP [1971] 1 MLJ 127 ***(foll)***
Mohamed Yusof Hj Ahmad v. PP [1983] 2 MLJ 167 ***(foll)***
PP v. Ku Hang Chua [1975] 2 MLJ 99 ***(foll)***
PP lwn. Ong Boon Kek & Yang Lain [1991] 3 CLJ 1744 ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 399(i)
Penal Code, ss. 34, 376

For 1st appellant - Trabawan Mandi; M/s Detta Samen & Co
For 2nd appellant - Sapuan Ahmad; M/s Idris & Co
For 3rd appellant - Osman Ibrahim; M/s Osman Ibrahim & Co
For the respondent - Marutin Pagan DPP

Reported by Mariette Peters-Goh

JUDGMENT

Muhamad Kamil Awang J:

All the three appellants herein were jointly charged for an offence of rape punishable under s. 376 of the Penal Code and read together with s. 34 of the same Code.

It must be noted from the outset that four persons were originally charged with the said offence. Prior to the commencement of the trial, the prosecution applied for the 4th accused to be discharged not amounting to acquittal and the said application was granted by the learned Sessions Court judge, which consequently lead the 4th accused to become a prosecution witness (PW1).

At the conclusion of the trial, all the three appellants were convicted and sentenced to an imprisonment term of 13 years and to be whipped with ten strokes of the rotan. Being dissatisfied with the said decision they appealed to this court.

As the facts of this case have been comprehensively laid down in the judgment of the learned Sessions Court judge, I do not see any purpose in repeating them herein.

Before deliberating further, it must be emphasised that all the three appeals are considered together using the outline of the submission by the learned counsel for the 1st appellant as the focus and applying the same to the other two appeals, since the grounds of the three appeals are somewhat similar.

Firstly, the learned counsel for the 1st appellant submitted that the learned Sessions Court judge erred in admitting the cautioned statement of the 1st appellant. In furtherance thereto, it was alleged that the making of the cautioned statement by the 1st appellant was caused by threat either directly or indirectly. Specifically, the learned counsel for the 1st appellant referred to the incident where the 1st appellant was interrogated for a continuous period of about six hours from 5.30pm to 11.35pm on 20 March 1994 without any dinner given to him. In another occasion, it was alleged that the 1st appellant was assaulted by the investigation officer which was witnessed by the 2nd appellant. At p. 46 of the Record of Appeal, the investigation officer (PW12) in reply to the question posed during cross examination said:

> The first meeting was very long. I asked him matters relating to the case. I spent six hours just asking questions about the case. I have a strong desire to solve this case. I really thoroughly questioned the 1st accused. I got upset if what 1st accused said did not tally with what the complainant had said.

Further down the line at p. 47 of the Record of Appeal, PW12 explained that:

> We took a break for dinner in the six hours interview. I am not sure where I had my dinner. I must have given him dinner but I am not very sure. Normally arrangement is made that the detainee be given food unless the detainee refused.

On the allegation of assault of the 1st appellant which was witnessed by the 2nd appellant, PW12 conceded that there were two or three meetings where both the appellants were present during the interrogation but denied assaulting anyone of them.

It is also pertinent to note that the cautioned statement was recorded on 24 March 1994 at 1.20pm and the 1st appellant was taken out practically everyday for interrogation after his arrest on 20 March 1994. Having taken the allegations and the whole circumstances of this case into consideration, this court is of the view that the prosecution failed to establish beyond reasonable doubt that the cautioned statement of the 1st appellant was given voluntarily. In coming to this decision, this court adopted the remarks of Syed Agil Barakbah J (as he then was) in the case of *Mohamed Yusof bin Haji Ahmad v. Public Prosecutor* [1983] 2 MLJ 167 at p. 169 as follows:

> The word "appears" indicates a lesser degree of probability than "proved" as defined in section 3. A well-grounded suspicion based on the facts and surrounding circumstances may exclude a confession. Since proof of inducement or threat is difficult and in many cases impossible of attainment

> at that stage, the discretion of the court is unfettered by the concrete standard of proof necessary in other cases. The court is therefore free to scrutinise the evidence and surrounding circumstances to determine the presence or absence of any threat or inducement, its sufficiency and how it worked in the mind of the accused. (See *Sarkar on Evidence* 12th edn p. 222).

The whole ambience engulfing the process of interrogation of the 1st appellant, apparently, was to ensure that the statement of the 1st appellant should tally with what the complainant had said.

Coming to the 2nd ground of the 1st appellant's appeal, the learned counsel for the 1st appellant submitted that the learned Sessions Court judge misdirected herself in convicting the 1st appellant by relying on the evidence of PW1. As I have explained in earlier part of this judgment, PW1 was originally charged together with the three appellants herein with the same offence. Prior to the trial, application was made by the prosecution to discharge PW1 not amounting to acquittal, thus, enabling him to become a prosecution witness. In a similar case of this nature, where an accused was charged with rape, the evidence of an accomplice who had been discharged but not acquitted was excluded from the consideration of the court as held in *Public Prosecutor v. Ku Hang Chua* [1975] 2 MLJ 99 at p. 101:

> I have excluded John Lu Su Thiam's (PW4) evidence entirely, though he gave evidence impressively in court which corroborates the complainant's evidence not only in material particular but also in detail; not because he is not competent to give evidence being himself an accomplice in the offence. But I consider the fact that the charge against him has been withdrawn by the prosecution at the last moment with the plea that he should not be acquitted and in fact he was not acquitted, gives rise to the inference that he was influenced by a continuing inducement to give favourable evidence for the prosecution. The inducement is too strong as it is coupled with a threat that proceedings would be continued against him at any time by the prosecution, to allow the court to admit his evidence.

Concurring with the abovesaid principles as enunciated, I am also of the same sentiment that the evidence of PW1 in the instant case ought to be excluded from the consideration of the learned Sessions Court judge, *albeit*, with or without any warning thereto.

With the exclusion of the evidence of PW1 and that the cautioned statement (exh. P7) held to be inadmissible, at this juncture, it is abundantly clear that without positive identification of the 2nd and 3rd appellants by the complainant, the charge against both of them could not stand.

Grounds 3 and 4 advanced by the learned counsel for the 1st appellant in his submission are now redundant.

Coming now to the 5th ground of the appeal, the court shall first deal with the admissibility of the medical report (exh. P9). The learned counsel for the 1st appellant alleged that the three appellants were not served with a copy each of the medical report contrary to s. 399(i) of the Criminal Procedure Code. In support of the said allegation, this court was referred to exh. P6, the acknowledgment receipt and the case of *Pendakwa Raya lwn. Ong Boon Kek & Yang Lain* [1991] 3 CLJ 1744 at p. 1747, where Faiza Tamby Chik J after having perused through a line of authorities held that:

> Saya berpendapat lanjutan daripada keputusan daripada autoriti-autoriti di atas, peruntukan kepada subs. (i) s. 399 itu adalah satu syarat terdahulu (condition precedent) dan syarat terdahulu itu termasuklah penyerahan satu salinan laporan itu kepada setiap orang tertuduh dalam sesuatu kes itu dan jikalau syarat penyerahan satu salinan kepada setiap orang terduduh itu tidak dipenuhi, maka laporan itu tidaklah boleh diterima di bawah s. 399 itu. Saya berpendirian sedemikian oleh kerana bahasa s. 399 itu adalah jelas dan tidak kabur (unambiguous).

It must be noted that from exh. P6, all the three appellants together with PW1 signed individually and acknowledged that they received a copy of the medical report. There is no evidence to suggest that only one medical report was served and shared among the four named recipients therein. As such, there is no basis to the allegation of the learned counsel for the 1st appellant that only one medical report was served on that day. Hence, it is the view of this court that s. 399(i) of the Criminal Procedure Code had been complied with when all the four named recipients in exh. P6 acknowledged receipt of the same.

Even on the assumption that the service of the medical report was effected contrary to s. 399(i) of the Criminal Procedure Code and to render it inadmissible following the decision in *Pendakwa Raya lwn. Ong Boon Kek & Yang Lain (supra)*, it still could not preclude the learned Sessions Court judge from considering the oral evidence of the doctor who examined the complainant after the alleged offence of rape was committed. In *Liew Chin Yoong v. Public Prosecuto*r [1971] 1 MLJ 127 at p. 128, Chang Min Tat J (as he then was) explained that:

> Basically, a trial is to be decided on oral evidence, except where by statutory provisions, evidence could be adduced by reports or certificates in writing. Where the chemist is called by the prosecution to furnish the court with the evidence it has failed to adduce by his certificate, he must give oral evidence

of his examination and findings, using his certificate, if he should find it necessary, to refresh his memory. This will have the practical effect of adducing in oral evidence what could not be admitted under section 399 of the Criminal Procedure Code.

Considering the oral evidence of the medical officer (PW11) as a whole, there is a clear and concise factum of rape perpetrated on the complainant. In the circumstances, there is no basis to disturb the findings of the learned Sessions Court judge on this point.

Upon the foregoing reasons, it is the view of this court that the prosecution succeeded in adducing more than sufficient evidence to meet the standard of proof beyond reasonable doubt in respect of the charge against the 1st appellant. The evidence of the complainant had been amply corroborated in all material particulars by the evidence of PW11, the medical officer, PW3, the aunty of the complainant and PW6, a friend who was with the complainant on the day of the incident and also on the day when the 1st appellant was arrested.

On the appeal against sentence, I am satisfied that there was no misdirection on the principles adopted by the learned Sessions Court judge when the said sentence of 13 years imprisonment and ten strokes of rotan was imposed on the 1st appellant.

In conclusion, the appeal by the 1st appellant is hereby dismissed and the conviction together with the sentence be affirmed. The 2nd and 3rd appellants' appeals be allowed and they are both discharged and acquitted.